Supreme Court, U.S.
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(2)

No. 91-1303

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRIPLE M DRILLING COMPANY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in holding that petitioners' lender liability claims are barred by 12 U.S.C. 1823(e) (Supp. I 1989) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-2a) and the district court (Pet. App. 3a-6a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1991. The petition for a writ of certiorari was filed on February 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner Triple M Drilling Company (Triple M) obtained a revolving credit line (Note) from MBank Houston, N.A. (MBank), where Triple M maintained various operating accounts. Pursuant

to a security agreement, Triple M pledged certain accounts receivable to secure the Note and agreed that any Triple M deposit account at MBank could be set off against Triple M's indebtedness. Triple M purchased drilling equipment from USX Corporation's Oilwell Division (Oilwell), financing these purchases in part by granting Oilwell a lien on Triple M's accounts receivable.

On March 3, 1987, the Note matured by its own terms. On March 25, 1987, Triple M and Oilwell executed a Subordination Agreement under which Oilwell's security interest in Triple M's accounts receivable was subordinated to MBank's security interest in those receivables. The Subordination Agreement's preamble reflects that it was designed "to induce [MBank] to extend or continue to extend credit [to Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations." Pet. 9. Nothing in the Subordination Agreement provides for extension of the Note or a new maturity date. To the contrary, the Subordination Agreement expressly reserves to MBank all of its rights against Triple M. Gov't C.A. Record Excerpts 9.

Subsequently, on May 15, 1987, nearly ten weeks after the Note matured, MBank exercised its right under the Note to offset the Triple M deposit account against Triple M's indebtedness; in addition, MBank notified Triple M's debtors to make payments directly to MBank, which was also a right expressly reserved to it under the terms of the Note. Pet. 5-6; Pet. App. 9a.

2. In July 1987, Triple M commenced this litigation in state court, alleging that MBank had orally agreed to extend the Note. Petitioners Gary Morrison, Carolyn Kato, Charles F. Kato, and Cleo Shows,

who were officers of Triple M, intervened on May 12, 1988. Pet. App. 4a-5a. Petitioners' claims against MBank included breach of contract, breach of a duty of good faith and fair dealing, fraud, violation of the Texas Deceptive Trade Practices Act, commercial disparagement, tortious interference with contract, defamation, and intentional infliction of emotional distress. *Id.* at 4a-6a.

In March 1989, MBank became insolvent, and the Federal Deposit Insurance Corporation (FDIC) was appointed its receiver. The FDIC as receiver removed the action to federal court and moved for summary judgment on the ground that petitioners' claims were barred under the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and under 12 U.S.C. 1823(e) (Supp. I 1989).[1] The district court granted summary judgment to the FDIC, holding that petitioners' claims were, as relevant here, barred

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[1] Section 1823(e) (12 U.S.C.) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement:
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

by *D'Oench* and Section 1823(e) because they arose out of the failure of MBank to comply with alleged agreements that had not been reduced to writing and recorded in the institution's books and records. Pet. App. 4a.[2]

3. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

ARGUMENT

1. Petitioners do not dispute that, under 12 U.S.C. 1823(e) (Supp. I 1989) and the *D'Oench* doctrine, unwritten agreements may not be the basis for diminishing or defeating the FDIC's interest in petitioners' Note. Pet. 3-4. Petitioners also admit that their entire case depends on the factbound issue whether the terms of the Subordination Agreement extended the maturity date of the Note. *Ibid.* Petitioners simply disagree with the lower courts' conclusion that the terms of the Subordination Agreement did not extend the due date of the Note, and point to no lower court decision that is in conflict with that conclusion. There is accordingly no basis for further review.

Petitioners do not claim that the Subordination Agreement unambiguously extended the maturity date of the Note. They point (Pet. 9), however, to vague language in the Subordination Agreement's

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[2] In addition, the court ruled that the officers lacked standing to bring Triple M's claims for commercial disparagement, fraud, breach of good faith, and tortious interference. Pet. App. 5a. The court also dismissed the officers' claims for defamation and intentional infliction of emotion distress because they were unsupported by either the allegations or the summary judgment evidence. *Id.* at 6a. Finally, the district court dismissed a claim for tortious interference with contract, finding that MBank had a bona fide right under the Note to offset the Triple M account and notify Triple M's customers to send payments directly to the bank. *Id.* at 9a.

preamble, and imply that this extended the due date of the Note; and they claim that it can be inferred, based on the Subordination Agreement as a whole, that the parties intended to extend the Note. Contrary to petitioners' suggestions, the Subordination Agreement did not extend the Note.

During negotiation of the Subordination Agreement, Triple M sought an explicit extension of the Note's maturity date, and MBank refused. See *Triple M Drilling Co.* v. *Seider*, No. 91-2523 (5th Cir. Feb. 18, 1992) (*Triple M II*) (*reprinted*, App., *infra*, 1a-7a).[3] If Triple M and MBank had agreed to such an extension, petitioners would not need to invoke the preamble language of the Subordination Agreement, which merely reflects a design to "induce" MBank to extend or continue to extend credit to Triple M. Nor would they need to claim that the document "as a whole can be read to see" that MBank extended the Note. Pet. 9. Petitioners' arguments are a concession that no agreement to extend the Note was ever executed. In *Triple M II*, the Fifth Circuit interpreted the *same* Subordination Agreement, and ruled that it is unambiguous and "is not an agreement to extend the revolving note." App. 6a.

Even if the Subordination Agreement were ambiguous and could be construed to extend the due date of the Note, petitioners' claims would still be barred by *D'Oench* and 12 U.S.C. 1823(e) (Supp. I 1989). The essence of the *D'Oench* doctrine is that the FDIC is

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[3] In that related case, Triple M brought claims against certain officers of MBank based on the same agreements and events that gave rise to this case. The Fifth Circuit recently held that the claims were, in the main, barred by claim preclusion. In the course of its discussion, the court stated that Triple M "[c]onced[ed] in their pleadings that MBank refused to sign an extension of the revolving note." App., *infra*, 2a; see also *id.* at 7a.

entitled to rely, to the exclusion of any extraneous matters, on the official bank records that set forth the rights and obligations of the financial institution. Accordingly, where bank documents are alleged to raise an inference of an agreement, such an inference will not withstand the federal regulator's *D'Oench* defense. See, *e.g.*, *Clay* v. *FDIC*, 934 F.2d 69, 73 (5th Cir. 1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016-1017 (5th Cir. 1990) (the FDIC need not search a failed bank's documents for inferences and hidden duties). Because the Subordination Agreement did not clearly reflect the bank's agreement to extend the Note's due date, petitioners are barred by *D'Oench* from arguing that such an extension was part of that agreement.

Section 1823(e) bars petitioners' claims for the same reason. Petitioners nonetheless demand a trial so that they may attempt to divine an agreement to extend the Note's maturity date from the Subordination Agreement and other "extraneous evidence."[4] Pet. 10. That demand is at odds with the purposes of Section 1823(e).[5] As this Court stated in *Langley* v.

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[4] Petitioners' effort to buttress their arguments by claiming to be "wholly innocent" borrowers is unavailing. The *D'Oench* doctrine applies in the absence of an intent to deceive or defraud banking authorities, in the absence of malfeasance, and where the borrower acted in good faith. *FSLIC* v. *Gordy*, 928 F.2d 1558, 1566-1567 (11th Cir. 1991); *Bowen* v. *FDIC*, 915 F.2d 1013, 1016-1017 (5th Cir. 1990); *Bell & Murphy & Assocs., Inc.* v. *Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 753-754 (5th Cir.), cert. denied, 111 S. Ct. 244 (1990).

[5] Because petitioners' claims are barred by the federal *D'Oench* and Section 1823(e) defenses, they are mistaken in asserting (Pet. 9-10) that Texas common law of contract interpretation entitles them to a trial. In any event, we point out that the *Triple M II* court held that, under Texas law, the Subordination Agreement could not be interpreted to extend

FDIC, 484 U.S. 86, 92 (1987), the "agreement" must be on file in the bank's records at the time of an examination. If it is not, examiners cannot make reliable evaluations of seemingly unqualified notes, such as the Note in the present case, which are later claimed to be subject to undisclosed conditions. See also *Beighley* v. *FDIC*, 868 F.2d 776, 782-783 (5th Cir. 1989). In short, if the agreement is not reflected in "explicit documentation" in the bank's books and records, it is "insufficient as a matter of law" to give notice to the FDIC, and is therefore unenforceable. *FDIC* v. *McCullough*, 911 F.2d 593, 601 (11th Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

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the due date of the Note, which is the interpretation offered by petitioners in this Court. App., *infra*, 6a-7a.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2523
Summary Calendar

TRIPLE M DRILLING COMPANY & GARY MORRISON,
PLAINTIFFS-APPELLANTS

versus

KATHRYN SEIDER, ET AL., DEFENDANTS-APPELLEES,
THIRD PARTY PLAINTIFFS

and

THE FEDERAL DEPOSIT INSURANCE CORPORATION
AS RECEIVER FOR MBANK HOUSTON,
THIRD PARTY DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Southern District of Texas
(CA H-90-3823)

(February 18, 1992)

Before POLITZ, Chief Judge, SMITH and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular

Alleging procedural and substantive errors, Triple M Drilling Company and Gary Morrison appeal an adverse summary judgment. Finding no error, we affirm.

Background

Morrison is Chairman of the Board of Directors of Triple M which obtained a line of credit from MBank Houston, N.A., and executed a $750,000 revolving note with a maturity date of March 3, 1987. Triple M secured the note with its accounts receivable and granted MBank the right to set off any deposit accounts against the debt and to notify Triple M's debtors in the event of default. When the note was not paid as required, MBank set off Triple M's accounts. The instant litigation is based on Triple M's interpretation of a subordination agreement executed after the note became overdue and the set off. In this agreement another creditor of Triple M subordinated its security interest in Triple M's accounts receivable to MBank's security interest in those receivables. Conceding in their pleadings that MBank refused to sign an extension of the revolving note, Triple M and Morrison nonetheless claim that the subordination agreement effected such an extension. The subordination agreement contains the following language in a preamble to a list of terms:

> NOW, THEREFORE, to induce [MBank] to extend or continue to extend credit to [Triple M] from time to time, and/or make or continue to make loans, advances, payment or other financial

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cases on the bases of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to the Rule, the Court has determined that this opinion should not be published.

> accommodations with and to [Triple M], and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by [MBank] to [Triple M] and [the subordinating creditor] hereby agree with [MBank] as follows:

Multiple terms follow. In addition to securing MBank's superior rights in the accounts receivable, the terms provide that MBank may "without impairing or releasing any of [MBank's] rights, . . . change the amount, manner, place or terms of payment of, or change or extend the time of payment of, or renew or alter the Bank Note in any and all respects. . . ."

Triple M filed suit against MBank; MBank subsequently became insolvent. In the suit against MBank the district court held that MBank's breach of contract, breach of good faith and fair dealing, and fraud claims, as asserted against the FDIC as Receiver of MBank, were foreclosed by the doctrine of D'Oench Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e). We affirmed. *See* Triple M Drilling Co. v. MBank Houston, N.A., No. H-89-1511 (S.D.Tex. Aug. 9, 1990), *aff'd*, No. 90-2999 (5th Cir. Nov. 19, 1991); *see also*, Clay v. FDIC, 934 F.2d 69 (5th Cir. 1991) (an inference of a secret agreement in bank documents will not withstand D'Oench Duhme). Triple M filed the instant action for breach of contract, breach of good faith and fair dealing, fraud, and tortious interference against the appellees, former officers of MBank. The appellees in the principle action in turn filed third-party complaints against the FDIC as Receiver for MBank. The district court granted summary judgment for the

bank officers and the FDIC. Triple M and Morrison appeal.

Analysis

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review the district court's grant of summary judgment *de novo*.

Morrison does not have standing to sue for the actionable wrongs committed against Triple M. Renfro v. FDIC, 773 F.2d 657 (5th Cir. 1985); Wingate v. Hajdik, 795 S.W.2d 717 (Tex. 1990). Triple M's claims for breach of contract, breach of good faith and fair dealing,[1] and fraud are barred by claim preclusion. *See* Lubrizol Corp. v. Exxon Corp., 871 F.2d 1279 (5th Cir. 1989). Claim preclusion bars the parties to a prior proceeding, or those in privity with them, from relitigating the same claims that were subject to a final judgment on the merits by a court of competent jurisdiction. Lubrizol. In the first suit against MBank, we affirmed the grant of summary judgment on identical breach of contract, breach of good faith and fair dealing, and fraud claims. Triple M. Drilling Co. v. MBank Houston, N.A., No. H-89-1511 (S.D. Tex. Aug. 9, 1990), *aff'd*, No. 90-

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[1] Regarding Triple M's claim for breach of good faith and fair dealing, we note that in any event, " '[u]nder Texas law there is no general fiduciary obligation between a lender and a borrower or between business parties.' " Clay v. FDIC, 934 F.2d 69, 72 (5th Cir. 1991) (quoting In re Letterman Bros. Energy Secs. Litig., 799 F.2d 967, 975 (5th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)); FDIC v. Coleman, 795 S.W.2d 706 (Tex. 1990).

2999 (5th Cir. No. 19, 1991).[2] The only difference between the final judgment in the prior suit and the instant litigation is that here Triple M has sued MBank's officers. Because Triple M's claims against the officers are for actions within the scope of their duties as MBank employees, identity of parties exists for purposes of claim preclusion. Lubrizol Corp.

In its tortious interference claim, Triple M argues that MBank interfered with Triple M's ability to conduct business by dishonoring checks and asking debtors to direct payments to MBank. The elements of a cause of action for tortious interferences under Texas law are: (1) a contract, (2) an intentional act calculated to cause damage and interfering with the contract, (3) actual damages caused by the intentional act, and (4) the lack of any justifiable cause or excuse on the part of the defendant. Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014 (5th Cir. 1990). Triple M argues that MBank lacked a justi-

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[2] The district court in Triple M Drilling Co. v. MBank Houston, N.A. found that breach of contract and good faith, and fraud claims were barred by section 1823(e), but the court allowed a tortious interference claim that did "not depend upon the validity of the alleged agreements." Triple M Drilling Co. v. MBank Houston, N.A., No. H-89-1151, Slip Op. at 3. *See* Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244 (5th Cir. 1990). We do not address whether the tortious interference claim in the first suit is the same one asserted in the instant litigation because Triple M may not bind the bank officers to the first suit. The claim preclusion is non-mutual: The officers, who were not a party to the first suit, are not bound by it. *See generally* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4463-64 (1981); *see also* Lubrizol, 871 F.2d at 1289 & n.15. We do not, in any event, address the application of section 1823, as we find summary judgment appropriate on the grounds articulated by the district court.

fiable cause to exercise its rights under the past due revolving note because the subordination agreement had extended the note. We conclude that as a matter of law this claim is not viable.

Triple M relies solely on the agreement's preamble language that it was designed "to induce [MBank] to extend or continue to extend credit to [Triple M]." We agree with the district court that the subordination agreement between MBank, Triple M, and the subordinating creditor is not an agreement to extend the revolving note, which was an existing parallel debt. The meaning of an unambiguous contract is a purely legal question that may be resolved by summary judgment. South Central Bell Telephone Co. v. Canal Place Ltd. Partnership, 927 F.2d 867 (5th Cir. 1991). Whether a contract term is ambiguous is a question of law reviewed *de novo*. Forest Oil Corp. v. Strata Energy, Inc., 929 F.2d 1039 (5th Cir. 1991). A Texas court will deem a contract unambiguous when it is reasonably open to only one interpretation when one considers standard rules of interpretation and the surrounding circumstances. Hanssen v. Qantas Airways Ltd., 904 F.2d 267 (5th Cir. 1990).

The subrogation agreement may not be given the interpretation advanced by Triple M. The preamble language emphasized by Triple M does not identify the note. None of the many terms provide for the note's extension. Further, the agreement does not set, or even reference, a new maturity date. Because the *only* function of an agreement to extend the note would be to set a new due date, the absence of this term would render the alleged agreement, if we took it to be such, indefinite and unenforceable under Texas law. *See* Bank of El Paso v. T.O. Stan-

ley Boot Co., 809 S.W.2d 279 (Tex. App. 1991); University National Bank v. Ernst & Whinney, 773 S.W. 2d 707 (Tex. App. 1989) (citing Moore v. Dilworth, 142 Tex. 538, 179 S.W.2d 940 (1944)) (an agreement must define the terms necessary for its enforcement). Triple M may not ask a jury to supply an essential contract term. Id. Even if we were to find an ambiguity and look beyond the four corners of the document to discern the meaning of the preamble phrase, it is still clear that MBank did not commit to an extension. Triple M stated in its pleadings that MBank expressly refused to sign an extension of the note.

Triple M complains that the district court had instructed it not to file a brief in opposition to the appellee's summary judgment motion. The record reflects that Triple M received notice of and attended a hearing on the summary judgment motion, and was allowed to submit written memoranda with a motion for rehearing. We perceive no error arising out of the matter complained of. Triple M has not identified any relevant evidence it was not permitted to introduce nor has it pointed to any error of law about which we are persuaded. Triple M has, therefore, not acquitted its burden of identifying a reversible error on appeal.

For the reasons assigned, the district court is AFFIRMED.

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